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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 1494

~~72~~-1494

UNITED STATES OF AMERICA,

Petitioner,

vs.

100 ACRES IN MARIN COUNTY, CALIFORNIA, DRAKE'S BEACH ESTATES, INC.

Amicus Curiae Brief of the State of California in Support of Petition for Certiorari Filed by the United States of America

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Interest of Amicus Curiae

Pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States, this brief is filed by the Attorney General of the State of California in support of the petitioner United States of America.

It is the policy of the State of California, expressed by its Legislature and by vote of its people, to protect, preserve and enhance the remaining natural and scenic resources of its coastal areas. See, for example, the Marine Resources Conservation and Development Act (California Government Code sections 8800-8827, inclusive), and the California Coastal Zone Conservation Act of 1972 (Public Resources Code sections 27000-27650, inclusive). This policy can be most effectively implemented if areas of special importance to

the coastal environment and ecology, such as the lands here in litigation, are acquired by Federal, State or local governmental entities. If the decision of the Court of Appeals herein is allowed to stand, such acquisition could become difficult or impossible because values would be unduly inflated by an erroneous conception of State law and policy.

Summary of Argument

Amicus curiae State of California appears herein in support of plaintiff United States of America. Our purpose is to take issue with that portion of the opinion of the Court of Appeals which upheld the trial court's ruling allowing testimony as to the reasonable probability that the adjoining state-owned tidelands would have been available in connection with the development of the subject property for a subdivision. The decision (at p. 10) states,

> ". . . One probable use was to straighten the common boundary line and the other was to provide a source of land fill for the condemned property while dredging the State's channels for recreational boatways. . . ."

We respectfully submit that this portion of the opinion reflects a misunderstanding of California law in the following respects:

1. Since the trial court found that the property in question was in a state of nature, the record conclusively establishes that the State Lands Commission was not empowered to enter into a fixed boundary line agreement under section 6357 of the California Public Resources Code and that as a matter of practice and policy it would not have done so.

2. Even if the State could have entered into a boundary line agreement, it was compelled by law to determine the correct boundary and was not empowered to "straighten out" defendant's waterward boundaries.

3. The evidence establishes that the dredging of the adjacent tidelands would have violated State law, State policy, and the public trust for navigation, commerce and fishery.

ARGUMENT

I

The Record Conclusively Establishes That Defendant Could Not Have Entered Into a Boundary Line Agreement With the State as of the Date the Land Was Taken by the United States

Section 6357 of the California Public Resources Code provides that:

> "The [State Lands] Commission may establish the ordinary highwater mark or the ordinary low water mark of any of the swamp, overflowed, marsh, tide, or submerged lands of this State, by agreement, arbitration, or action to quiet title, whenever it is deemed expedient or necessary. . . ."

So long as lands adjacent to the tide or submerged lands are in a state of nature, unaffected by artificial influences or avulsion, the waterward boundaries thereof are subject to constant fluctuation resulting from natural and gradual changes in the shoreline. *Strand Improvement Co. v. City of Long Beach*, 173 Cal. 765, 770-73; 161 Pac. 975, 977-78 (1916). It is obvious that under such circumstances a purported boundary line agreement would merely establish a historical boundary, which would immediately thereafter be subject to change by reason of accretion or erosion. The record herein conclusively establishes that under such circumstances the State Lands Commission would *not* in 1963 nor thereafter enter into a boundary line agreement with the upland owner and in fact refused to do so with regard to the very lands involved herein. Value Tr. pp. 2193-95; Plaintiff's Exhs. R-1 and R-2.

Once lands have been substantially affected by artificial influences, the waterward boundary line thereof

becomes fixed, and subsequent accretions do not inure to the upland owner but belong to the State. *Carpenter v. City of Santa Monica*, 63 Cal. App. 2d 772, 787-94, 147 P. 2d 964, 972-75 (1944). It is only under these circumstances that the State can enter into a meaningful boundary line agreement. It is true that Mr. Nadey, a witness for the defendant, testified that the subject lands *had* been affected by artificial accretions. Value Tr. pp. 2202-04. However, this testimony must be disregarded in the face of the District Court's express finding that since the date of the original patent thereof (*i.e.*, June 4, 1860) all changes in the configuration of the subject land have been the result of *natural* erosion and accretion. Finding No. 15. The witness's speculation that a boundary line agreement was available to the landowner must be disregarded for the further reason that it is in conflict with uncontested documentary evidence (of which he was obviously unaware) that the landowner had been *refused* a boundary line agreement just eighteen months prior to the taking, because the lands were in a state of nature. Plaintiff's Exhs, R-1 and R-2.

II

Even if the Jury Was Properly Allowed to Consider the Possibility of a Boundary Line Agreement, Such Agreement Could Not Have as Its Purpose the "Straightening" of Defendant's Waterward Boundaries

During the course of his testimony, Mr. Nadey was permitted (over plaintiff's objection) to speculate that if, some time in the future, defendant should inform the State Lands Commission that defendant intended to develop the subject lands in such a manner as to create

an artificial condition, the Commission might then consider a boundary line agreement. Value Tr. pp. 2199-2203.

Even assuming the propriety of this testimony, it should be noted that the witness testified that the procedure followed by the Commission would be to run an actual survey of the natural line and, in the event the private owner introduced artificial influences immediately thereafter, it could be assumed that the survey line represented the last natural position of the seaward boundary. Value Tr. pp. 2200-01. California decisions demonstrate that any attempt to depart from this procedure and deliberately "straighten" the upland owner's boundary would create serious questions under the California Constitution. This is illustrated by the following language from the recent California Supreme Court decision in *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 480, 476 P. 2d 423, 436 (1970):

> "We reaffirm our holding in *Muchenberger*,[1] which we summarize as follows: When the boundary between public trust tidelands and private uplands is uncertain, and the parties, wishing to fix the boundary in order to prevent future questions of ownership, *undertake genuine efforts to determine the true boundary and thereafter agree to a line which fairly represents these efforts*, then the subsequent formal 'conveyance' in the form of a quitclaim deed by the trustee in furtherance of the boundary agreement does not evidence a 'grant or sale' of public tidelands within the meaning of article XV, section 3, of the State

[1]*Muchenberger v. City of Santa Monica*, 206 Cal. 635, 275 Pac. 803 (1929).

> Constitution. This principle is wholly consistent with the meaning and purpose of the constitutional provision, *for it simply permits the state and its trustee to undertake genuine efforts to determine the extent and true boundaries of public tidelands and to settle such boundaries in fair accordance with the findings resulting from those efforts.* (See also *City of Los Angeles v. Borax Consolidated Ltd.* (9th Cir. 1939) 102 F. 2d 52, 56-57.)" (Emphasis added.)

Even more objectionable under the facts in this case was the trial court's permitting the witness to speculate as to the possibility of defendant's straightening his boundary by means of an "exchange" pursuant to section 6307 of the California Public Resources Code.[2] Value Tr. pp. 2162-64. It is true that the State has the power to exchange tidelands under certain stringent conditions; however, such lands are held by the State subject to a public trust forbidding alienation which would impair navigation, commerce or fishery. (*People v. California Fish Co.*, 166 Cal. 576, 584-87, 138 Pac. 79, 82-83 (1913).) As discussed more fully below, the subject lands are in an area of vital ecological concern and any exchange of lands which led to the subdivision

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[2]As of the date of the taking (October 23, 1963), this section read as follows:

> "Whenever it appears to the commission to be in the best interests of the State, for the improvement of navigation, aid in reclamation, or for flood control protection, on navigable rivers, sloughs, streams, lakes, bays, estuaries, inlets, or straits, the commission may exchange lands of equal value, whether filled or unfilled with any state agency, political subdivision, person, or the United States or any agency thereof. Any land so acquired shall have the same status as to administration, control and disposition as the lands for which it was exchanged."

thereof [Value Tr. p. 2179] would quite clearly impair the public trust because such exchange and ensuing development would undoubtedly be inconsistent with the retention of the ecological values of the area.

III

The Trial Court Erred in Allowing the Jury to Speculate That the Value of the Subject Land Was Enhanced by the Possibility That Defendant Might Obtain the Right to Dredge State-Owned Tidelands

As stated above, the State owns all tide and submerged lands within its boundaries subject to a public trust. The administration of this trust has been delegated by the Legislature to the State Lands Commission (Public Resources Code §6301), and the Commission is required by law to exercise all its discretionary authority in the best interests of the State (Public Resources Code §6005). The California Supreme Court recently stated that:

> ". . . There is a growing public recognition that one of the most important uses of tidelands—*a use encompassed within the tidelands trust*—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area . . ." *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P. 2d 374, 380 (1971) (Emphasis added).

The recognition that recreational and ecological purposes are included within the public trust is not a new concept in California law. *Forestier v. Johnson*, 164

Cal. 24, 40, 127 Pac. 156, 162-63 (1912); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 744, 238 P. 2d 128, 132-33 (1951).

The record herein establishes beyond question the universal recognition that as of the date of taking (October 23, 1963) the subject lands, and the tidal waters adjacent thereto, were of vital ecological and environmental importance. Prior to September 13, 1962, when Congress passed the Act to establish the Point Reyes National Seashore, Public Law 87-657, 76 Stat. 538, the areas of State tidelands and submerged lands immediately adjacent to the subject lands were set aside by the State of California as a Clam Preserve and Eel Grass Preserve and oyster allotments were granted. [Pltfs. Exhs. BC and BD.]

On the other hand, the trial court itself characterized Mr. Nadey's testimony as "very general in its nature, describing the mechanics by which the Land Commission operates and the general procedures followed by staff members." Value Tr. p. 2187, lines 10-17. We submit that under these circumstances, the Jury should not have been allowed to speculate as to the likelihood that the State Lands Commission might allow the defendant to impair the public trust and the vital interests of the people of the State and the United States by dredging the adjacent waters and filling the subject lands to facilitate subdivision. We recognize the weight which must be given to the Jury's verdict. However, we submit that the following quotation from *White v. State of California*, 21 Cal. App. 3d 738, 759-60, 99 Cal. Rptr. 58, 73 (1971), reflects Federal as well as State law:

> " 'The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion' . . .; its value . . . rests upon

> the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion. . . . Such an opinion is no better than the reasons given for it . . ., and if it is 'not based on facts otherwise proved, or assumes facts contrary to the only proof, it cannot rise to the dignity of substantial evidence . . .'" [Court's emphasis. The quote is from *Carter v. United States,* 252 F.2d 608, 617 (D.C. Cir. 1957).]

Here, Mr. Nadey merely stated the general practices of the California State Lands Commission. He demonstrated no specific knowledge of the crucial policy considerations (nor certainly of the legal considerations) which would be involved in the transactions about which he speculated and he was not aware that the defendant's request for a boundary agreement had been rejected. Hence, his testimony does not rise to the dignity of substantial evidence in support of this element of valuation.

Conclusion

The United States should be granted a writ of certiorari in this case and the judgment awarding compensation should be reversed and a new trial ordered.

DATED: May 14, 1973.

Respectfully submitted,

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